1958

Cleo N. Smith v. Esther Morris et al : Brief of Respondent

Utah Supreme Court

E. R. Callister; Raymond W. Gee; Attorneys for Respondent;

In the
Supreme Court of the State of Utah

CLEO N. SMITH,
Plaintiff,

vs.

ESTHER MORRIS,
Defendant.

THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH,
Plaintiff and Respondent,

vs.

GEORGE B. HANDY,
Defendant and Appellant.

Case No.
8947

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Respondent is in substantial agreement with the appellant's Statement of Facts, but would clarify and emphasize certain aspects of the case. George B. Handy was counsel for plaintiff, Cleo N. Smith, in the case of Cleo N.

Smith v. Esther Morris, No. 114357, in the District Cour of Salt Lake County, State of Utah. A pre-trial hearin of the case was held March 20, 1958 and pursuant to th pre-trial order of the Court, dated March 24, 1958, counse was informed that the case had been set for jury trial o April 29, 1958 at 10 o'clock a. m. (R. 5). A jury of sixtee qualified jurors was drawn on April 25, 1958 (R. 6).

On the 29th day of April, 1958, and at the time set fo trial, Attorney George B. Handy (1) did not appear; (2 did not communicate to the Court his intention to absen himself; (3) has never given the Court an explanation o his absence (R. 6).

The Court, on its own motion, ordered Attorney Hand as a result of his conduct to pay within 10 days the sun of $128.00, an amount equal to the costs incurred in pro curing a jury. Although Attorney Handy was informed o the Court's order on April 29, 1958, he chose to ignore it On July 22, 1958, the Court entered a judgment in the sun of $128.00 against defendant Handy and in favor of th District Court of Salt Lake County (R. 6). From this judg ment appellant has appealed.

STATEMENT OF POINTS

POINT I.

THE COURT DID NOT ERR IN ORDERING ATTORNEY HANDY TO PAY $128.00 FOR HIS MISCONDUCT.

ARGUMENT

POINT I.

THE COURT DID NOT ERR IN ORDERING ATTORNEY HANDY TO PAY $128.00 FOR HIS MISCONDUCT.

Contrary to the contention of appellant, we are of the conviction that the issue in this case is not whether an attorney is liable for the costs of impanelling a jury, but whether an attorney may be summarily punished for his failure to attend court.

An attorney may be guilty of contempt for wilfully neglecting his duty to attend the trial of a case when it is called. 12 Am. Jur., Contempt, Sec. 11, page 396. According to Section 78-32-1, U. C. A. 1953:

> "The following acts or omissions in respect to a court or proceedings therein are contempts of the authority of the court:
>
> "* * *
>
> "(3) Misbehavior in office, or other wilful neglect or violation of duty by an attorney, counsel, clerk, sheriff, or other person appointed or elected to perform a judicial or ministerial service.
>
> "* * *
>
> "(9) Any other unlawful interference with the process or proceedings of a court.
>
> "* * *"

Generally the question is not whether an attorney's failure to attend court is contempt, but whether such conduct is a direct or indirect contempt. See Annotation, At-

torneys' failure to attend court or tardiness as contempt, 59 A. L. R. 1272.

Section 78-32-3, U. C. A. 1953, provides:

> *"When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily,* for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as prescribed in section 78-32-10 hereof. When the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators or other judicial officers." (Emphasis added.)

Section 78-32-10, U. C. A. 1953, provides:

> "Upon the answer and evidence taken the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it is adjudged that he is guilty of the contempt, a fine may be imposed upon him not exceeding $200, or he may be imprisoned in the county jail not exceeding thirty days, or he may be both fined and imprisoned; provided, however, that a justice of the peace may punish for contempt by a fine not to exceed $100 or by imprisonment for one day, or by both such fine and imprisonment."

In applying the foregoing statutes to the case at hand, two questions are raised: (1) May an attorney be summarily punished for failure to attend court? (2) Was the lower

court's action in this case in the nature of a contempt proceeding?

According to the case of *Lyons* v. *Superior Court,* (Calif.), 278 P. 2d 681, an attorney by absenting himself from the court, and thus obstructing a trial, is within the view and presence and knowledge of the court as would be any other conduct by him during the trial. The California court states as follows:

"* * *

"We are likewise satisfied that petitioner's conduct constituted 'a contempt * * * committed in the immediate view and presence of the court'—i. e., a direct contempt—which the court is empowered to punish summarily under the provisions of section 1211 of the Code of Civil Procedure. It is clear that the trial and the attorneys' participation in it are in the court's immediate view and presence and, obviously, petitioner's obstruction of the trial by absenting himself from the court is just as directly within the view and presence and knowledge of the court as would be any other conduct by him during, and directly affecting, the trial. If in truth, the absence with its ensuing interruption of the court proceedings is occasioned by some cause not reasonably within the attorney's control, the duty of explanation is but part and parcel of his duty to be present, and the burden of producing the exculpatory facts to the court properly falls upon the attorney. The latter, not the judge, is the officer of the court who under those circumstances owes a duty of proceeding. The effect of a contrary holding would be to absolve the defaulting attorney from any burden of explanation of his absence, no matter how flagrant and often repeated, unless the judge takes the burden of filing a charge and instituting formal proceedings. This would make of the judge

> not a judicial officer carrying out the responsibili ties of his office, but a complaining witness in a adversary proceeding. Such a rule, we think, woul not only be contrary to long established law bu would not best serve the administration of justice.

See also *Shotkin* v. *A. T. & S. F.*, (Colo.), 235 P. 2d 990.

Respondent admits the existence of authority to th contrary wherein it has been held that an attorney's failur to attend court is an indirect contempt, requiring the filin of an affidavit and subsequent hearing. To this effect, w invite the Court's attention to the annotation, Attorney' failure to attend court or tardiness as contempt, 59 A L. R. 1272, and to the cases of *Klein* v. *United States*, 15 F. 2d 286, and *Lee* v. *Bauer*, (Fla.), 72 So. 2d 792. Whe an attorney fails to attend court and therefore is not physi cally present in the court, the foregoing cases consider an resulting contempt could not be "committed in the presenc of the court." However, it is the attorney's "absence" tha is offensive to the court and interrupts the trial procedure and that "absence" does occur in the view and presence o the court.

We submit that the reasoning in the *Lyons* decision supra, is persuasive and recognizes that the failure of a attorney to attend court may be contempt and the burde of explaining the absence should properly rest with th attorney himself, and not upon the court in instituting a adversary proceeding. The cases which would hold a attorney guilty of an indirect contempt through his failur to attend court place great weight upon the possibility tha such failure may arise out of excusable circumstances. W

would readily admit that in many cases of failure to attend court, an attorney would have a reasonable excuse for his conduct. However, this would not necessarily compel the conclusion that the attorney should not be summarily punished, and require the filing of the necessary affidavit and citation of the offender into court on an order to show cause. We submit that under Rule 60(b) of the Utah Rules of Civil Procedure, one summarily adjudged guilty of contempt for failure to appear might, upon his own motion, set forth a reason justifying relief from the operation of the judgment and, to that extent, mitigate the effect of a contempt order. This would place the burden where it should be, that is, on the absenting party, and at the same time permit relief upon a sufficient showing.

The action of the lower court in entering a judgment and order for Attorney Handy to pay $128.00 was in spirit a contempt proceeding and was based upon the attorney's misconduct, i. e., failure to appear and failure to inform the court of his intended non-appearance. The action of the court was in substantial compliance with the requirements of Section 78-32-3, supra, and Attorney Handy could have gathered no other conclusion from the court's action than that the order to pay $128.00 was based upon his conduct in failing to attend court.

CONCLUSION

In view of the argument and authority advanced, the judgment and order of the lower court should be affirmed.

Respectfully submitted,

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